IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 201

TROJAN POWDER COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

A. V. CHERBONNIER,
KENNETH SOUSER,
ROBERT A. LILLY,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

Table of Cases.

IN THE

Supreme Court of the United States

TROJAN POWDER COMPANY, Petitioner, *against* NATIONAL LABOR RELATIONS BOARD, Respondent.	October Term, 1942. No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, Trojan Powder Company, respectfully prays that a Writ of Certiorari issue to review the final order of the United States Circuit Court of Appeals for the Third Circuit, entered on April 27, 1943, enforcing a final order of the National Labor Relations Board, dated June 26, 1942.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 135 Fed. 337.

JURISDICTION.

The jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Section 10 (e) of the National Labor Relations Act, (hereinafter referred to as

The Act), 29 U. S. C. A. §160(e). Jurisdiction of this Court to issue the writ sought is provided by the Act, 29 U. S. C. A. §160(e) and by the Act of February 13, 1925, 28 U. S. C. A., §§346, 347.

Designation of Parties.

The petitioner in this Court was the respondent below and the respondent in this Court was the petitioner below. To avoid confusion, we shall refer to the petitioner here as the Powder Company and to the respondent here as the Board.

Statement of the Case.

On or about June 26, 1942, the Board, after a hearing upon an amended charge filed by the United Mine Workers of America, District 50, ordered that the Company cease and desist from "* * *. In any manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining and other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act." The Board also ordered that notices be posted for a period of 60 days and that compliance be effected within ten days.

The allegations of unfair labor practices within the meaning of Section 8 (5) of the Act were dismissed.

Thereafter, the Board petitioned for the enforcement of the Order; the issues before the Circuit Court of Appeals were:

(a) Whether there is any substantial evidence to support the conclusion of the Board that the actions of the

respondent constituted unfair labor practices prohibited by Section 8 (1) of the Act?

(b) Whether the Board's Order is valid?

(c) If the Board's Order is valid, to what extent may an employer communicate with its employees?

(d) If the Board's Order is valid, should the Court order the issuance of a mandatory injunction the effect of which would be futile because of prior compliance?

On January 18, 1943, the issues were argued before the Circuit Court of Appeals and the opinion of the Circuit Court enforcing the order of the National Labor Relations Board was filed on April 6, 1943. On April 27, 1943, the decree of the Circuit Court of Appeals for the Third Circuit was entered and filed. In its opinion the Circuit Court of Appeals ordered that the Powder Company should:

(1) Cease and desist from interfering with, restraining or coercing its employees in the exercise of their right of self organization, etc., as guaranteed in Section 7 of the Act, and

(2) Post notices and notify the Regional Director that said notices were posted.

It is the Order of the Circuit Court of Appeals, entered on the opinion of Goodrich, C. J., which the Company seeks to review in this Court by writ of certiorari.

Questions Involved.

First: Whether an employer may attempt to influence his employees without violating the Act.

Second: Whether the Board is entitled to an enforcement order by the Circuit Court of Appeals, merely because

the Board has decided the question against the petitioner, *i.e.* was it the intention of Congress that the Court be a mere mechanical device to enforce the will of the Board or must the Circuit Court of Appeals exercise its judicial function by inquiring into the circumstances and the evidence to determine that the Order is supported by substantial evidence?

This question naturally resolves itself into the two following inquiries:

(a) Can the Circuit Court of Appeals properly hold that the facts found by the Board are supported by substantial evidence, if, as held by the Court, "the evidence is capable of the conclusion either in favor of the respondent or against it"?

(b) Can such letters, concerning which the Circuit Court said "* * *. Much of their language is innocuous and indeed, standing by itself, could hardly receive anything but an innocent interpretation. * * *", be considered as a violation of the Act in view of the constitutional guaranty of free speech, contained in the First Amendment of the Constitution of the United States?

THIRD: Whether an employer is entitled to know from exactly what acts he is restrained, *i.e.* if a person is ordered to "cease and desist" from doing something the presupposition is that prior to the order the person did whatever he was ordered to cease and desist from doing. Therefore, is not the person entitled to know exactly what he is ordered to cease and desist from doing?

Reasons for Granting the Writ.

The decision of the Court of Appeals in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *N. L. R. B.* v. *American Tube Bending Company*, 134 F. 2d 993.

Although there was a series of letters written by the Company, the last letter which contained the so-called "anti-strike pledge" appears to be the only letter in which the Court of Appeals found any questions (cf. Page 339 of reported Opinion). Therefore, from its facts, the *American Tube Bending Company* case is parallel to the case at bar, and the result is opposite. The *American Tube Bending Company* case has not been disapproved or overruled by this Court.

In the *American Tube Bending Company* case the Court relied upon *N. L. R. B.* v. *Virginia Electric & Power Company*, 1941, 314 U. S. 469, to support its holding that the letter and speech were not prejudicial to the employees' rights of collective bargaining.

In this case, the Court of Appeals relied upon *N. L. R. B.* v. *Virginia Electric & Power Company, supra,* only as authority for the contention that the statute gives to the Board responsibility of fact finding. It is true that the statute gives to the Board the responsibility of fact finding, but the statute makes the Board's findings of facts conclusive only when said facts are based on substantial evidence. *Midland Steel* v. *N. L. R. B.*, 1940, 113 F. 2d 800, 805.

The Board held that the Powder Company interfered with, restrained and coerced its employees but based the finding of fact upon what the Circuit Court of Appeals held as "innocuous statements". This so-called finding of fact by the Board is no more than a conclusion based on the inference that the innocuous statements were interference,

restraint or coercion. In order for the Court to be bound by the conclusion the inference must be based upon substantial evidence.

This Court has held that substantial evidence means "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, 230.

It does not mean that because there is testimony that a certain event took place, necessarily such event did take place. It means that the burden has been sustained by the Board only when there has been such evidence as would prevent a Court from dismissing a complaint or directing a verdict in a trial before a jury. *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299, 300. *N. L. R. B.* v. *Thompson Products*, 97 F. 2d 13, 15.

In the present case the Court of Appeals stated (page 339 of the reported opinion) that the Act "'precludes an independent determination of the facts.' National Labor Relations Board *v.* Virginia Electric & Power Co., 314 U. S. 469, 476 (1941)." It then went on to say

> "* * *. We cannot say that the facts outlined above are incapable of sustaining the conclusion found by the Board. The evidence is capable of a conclusion either in favor of the respondent or against it. The Board has concluded against it. We have no authority to interfere with that finding."

Such reasoning is in conflict with the holdings of this Court in *Consolidated Edison Company* v. *N. L. R. B.* and *N. L. R. B.* v. *Columbian Enameling & Stamping Co.* (*supra*).

Indeed, it is entirely contradictory to a holding of the same Court made in 1941 in *Quaker State Oil Refining Corporation* v. *N. L. R. B.*, 119 F. 2d 631. In that case while discussing the meaning of the words substantial evidence the Court said at page 632:

> "* * *. Certain it is, however, that we must analyze the evidence and determine its weight to the extent which may be necessary to decide whether it is evidence which 'a reasonable mind might accept as adequate to support a conclusion,' (1) and which affords 'a substantial basis of fact from which the fact in issue can be reasonably inferred,' (2) and not merely evidence which creates a suspicion or gives equal support to inconsistent inferences."

In view of the above how can it now be held that evidence, which is capable of inconsistent conclusions, is substantial evidence?

The question involved is one of great public importance, and there is pressing need for final determination of the matter by the Supreme Court. We need not labor this point; the magnitude of the importance is shown by the fact that without a decision by this Court the respondent as well as every other employer has no knowledge of what may be done by it under the doctrine of free speech or what communications, the language of which may be "innocuous", it may address to its employees. Unless this Court grants this petition, this employer may not properly communicate either verbally or in writing with its employees on any matter pertaining to their employment, because even an "innocuous" statement would be in violation of the decree of the Court of Appeals.

Respectfully submitted,

TROJAN POWDER COMPANY,

By A. V. CHERBONNIER,
KENNETH SOUSER,
ROBERT A. LILLY,
Counsel for Petitioner.

New York, New York, July 26, 1943.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to favorable consideration of this Court, and that it is not filed for the purpose of delay.

A. V. CHERBONNIER.

New York, New York, July 26, 1943.